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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-10a) is not yet reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 11a-12a) was entered on February 12, 1980. The United States filed a notice of appeal on March 10, 1980 (App. C, *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 3-4 n.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution and the pertinent portions of the applicable salary statutes are set forth in Appendix D, *infra*, 14a-26a.

QUESTIONS PRESENTED

1. Whether, as a matter of statutory construction, the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 788) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 657) served to supersede or rescind the fiscal year 1979 and fiscal year 1980 cost-of-living increases authorized for Article III judges by the Executive Salary Cost-of-Living Adjustment Act.

2. Whether, at the time the 1978 Pay Act was enacted, the cost-of-living salary increase prescribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution.

3. Whether the 1978 Pay Act, which eliminated a future salary increase scheduled for Article III judges under the Adjustment Act, and the 1979 Pay Act, which prospectively reduced the amount of a salary increase then in effect for Article III judges, violated the Compensation Clause, where the Acts did not represent a discriminatory attack on Article III judges and were not enacted with the purpose or effect of undermining the independence of Article III judges.

STATEMENT

This case is a sequel to *United States* v. *Will*, question of jurisdiction postponed to the hearing on the merits, No. 79-983 (Feb. 19, 1980) (*Will I*). In *Will I*, the district court held that the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) violated the Compensation Clause of the Constitution (Article III, Section 1; App. D, *infra*, 14a) by failing to increase the salary of Article III judges for fiscal years 1977 and 1978 in accordance with the Executive Salary Cost-of-Living Adjustment Act (App. D, *infra*, 14a-17a). The court held in addition that, as a matter of statutory construction, the Pay Acts did not modify or repeal the judges' substantive entitlement to the annual cost-of-living increases authorized by the Adjustment Act. *Will* v. *United States*, 478 F. Supp. 621 (N.D. Ill. 1979). In the instant case, the same district judge, relying on his decision in *Will I*, has held that the 1978 Pay Act (Pub. L. No. 95-391, 92 Stat. 788) and the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 657) are unconstitutional under the Compensation Clause and in any event were not intended by Congress to eliminate or reduce the judges' cost-of-living increases prescribed in the Adjustment Act for fiscal year 1979 and fiscal year 1980 (App. A, *infra*, 4a-12a).

1. The operation of the federal pay system is explained in our Jurisdictional Statement in *Will I* (pages 4-8). Insofar as pertinent here, this system may be briefly summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 ("Federal Salary Act"). See 2 U.S.C. 356. Under this Act, the salaries of these officials are reviewed every four years for the purpose of determining and providing appropriate pay levels.

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 (App. D, *infra*, 14a-17a) ("Adjustment Act"). This Act is generally applicable to the offices covered by the Federal Salary Act, including those of the Vice President, Cabinet officers and other Executive Schedule officials, members of Congress, and, pursuant to 28 U.S.C. 461(a), federal judges. Under the Adjustment Act, such salaries are subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305-5308 ("Comparability Act"). Annual cost-of-living ad-

justments in GS rates are based upon the report and recommendations of the President's pay agent as provided in 5 U.S.C. 5305(a) (App. D, *infra*, 17a-18a) or, if the President considers these recommendations inappropriate in light of national emergency or economic conditions affecting the general welfare, upon an alternative plan prepared by the President and not disapproved by Congress. See 5 U.S.C. 5305(c), (m) (App. D, *infra*, 20a-21a). For federal judges, the Adjustment Act provides that cost-of-living increases become effective "at the beginning of the first applicable pay period commencing on or after the first day of the month in which [the GS increase takes effect]." 28 U.S.C. 461(a) (App. D, *infra*, 14a).

2. a. In October 1978, as recommended in the report of the President's pay agent, GS salaries were increased under the Comparability Act by an overall average of 5.5%. Exec. Order No. 12087, 3 C.F.R. 234 (1978 Compilation). On September 30, 1978, Congress enacted the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789 (App. D, *infra*, 21a-23a) ("1978 Pay Act"). The 1978 Pay Act provided that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 [fiscal year 1979], by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or *judicial branch*, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for Sep-

tember 30, 1978 * * * [if the rate of salary exceeds a specified level]" (*id.* at 22a; emphasis added). Because of this provision, cost-of-living increases of 5.5% that otherwise would have taken effect in October 1978 under the Adjustment Act did not occur for a broad range of ranking government officials, including the Vice President, Cabinet officers and other Executive Schedule personnel, members of Congress, and federal judges.

b. For fiscal year 1980, the President's pay agent recommended an average GS cost-of-living adjustment of 10.41% under the Comparability Act. See 15 *Weekly Comp. of Pres. Doc.* 1530 (Aug. 31, 1979). However, in light of "[i]nflation [which] continues to be the single greatest threat to our economy and * * * a national problem of foremost concern," the President on August 31, 1979, submitted an alternative plan calling generally for a 7% increase (*ibid.*). The President's alternative plan became effective in October 1979 when neither House of Congress disapproved it within 30 legislative days. See 5 U.S.C. 5305(c)(2) (App. D, *infra*, 21a).

Accordingly, on October 1, 1979 (the beginning of the first applicable pay period commencing on or after the first day of the month in which the GS increase for fiscal year 1980 took effect), two adjustments occurred in the salaries of, among others, federal judges. First, the 7% cost-of-living adjustment for fiscal year 1980 based on the President's alternative plan became effective. Second, since the 1978 Pay Act expired by its own terms on September 30,

1979, the 5.5% increase that the Act had superseded during fiscal year 1979 automatically went into effect. Together, these two adjustments resulted in a compounded salary increase of approximately 12.9%.

On October 12, 1979, however, the 1979 Pay Act (Pub. L. No. 96-86, 93 Stat. 656; App. D, *infra*, 23a-26a) was signed into law. The 1979 Pay Act provides that "[f]or the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay * * *" (*id.* at 24a). The Act further provides (*ibid.*):

> That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of [the 1978 Pay Act], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation [pay raises of 5.5% shall be allowed].

Because of the 1979 Pay Act, the fiscal year 1980 salary increases of all individuals subject to the 1978 Pay Act, including the Vice President, Cabinet officers

and Executive Schedule personnel, members of Congress, and federal judges, were reduced to 5.5% as of October 12, 1979.

3. On October 19, 1979, appellees commenced this litigation in the United States District Court for the Northern District of Illinois. Appellees contended that the 1978 and 1979 Pay Acts were unconstitutional under the Compensation Clause because they deprived Article III judges of the cost-of-living increases authorized in the Adjustment Act. Appellees also asserted that, as a matter of legislative intent, the Pay Acts were only appropriations measures that refused to provide funds for the cost-of-living increases but did not alter the substantive entitlement to the increases pursuant to the Adjustment Act. Finally, appellees argued that the 1979 Pay Act on its face covered only "executive employees, which includes Members of Congress" (App. D, *infra*, 24a) and was simply inapplicable to federal judges.

By order dated January 31, 1980, the district court granted appellees' motion for summary judgment (App. A, *infra*, 1a-10a).[1] The court held that the

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[1] The court also certified two plaintiff-classes consisting of all persons who served as Article III judges prior to October 1, 1978, and continued to hold office after that date (the Count I class, concerning the 1978 Pay Act), and all persons who served as Article III judges prior to October 1, 1979, and continued to hold office subsequent to October 12, 1979 (the Count II class, concerning the 1979 Pay Act) (App. A, *infra*, 4a). The district judge in this case had been appointed to the bench on October 11, 1977, and thus, unlike the situation in *Will I*, was himself a class member.

1978 and 1979 Pay Acts violated the Compensation Clause "for the same reasons that identical actions by Congress in 1977 were held unconstitutional" in *Will I* (App. A, *infra*, 5a). Based on its view that "subsequent to the 1975 * * * [enactment of the Adjustment Act], the judge's [*sic*] compensation became an annual salary as adjusted by the cost-of-living increase percentage" (*id.* at 6a), the court concluded that the 1978 and 1979 Pay Acts were invalid under the Compensation Clause as "directly diminishing the compensation provided for by statute for federal judges" (*id.* at 8a). The court also found that the 1978 and 1979 Pay Acts, in failing to appropriate funds for cost-of-living increases, were not intended by Congress to "repeal, suspend, or postpone the operation of the * * * Adjustment Act as it applies to federal judges. * * * [T]he failure to appropriate funds does not defeat a governmental obligation created by statute" (*id.* at 8a, 10a). Finally, with regard to an issue that had not been presented in *Will I*, the court noted that it was "inclined to agree with [appellees'] contention" that the 1979 Pay Act is inapplicable to federal judges because "they are neither 'executive' employees nor 'members of Congress,' " but the court did not consider the question further because of its determination that the Act would be unconstitutional if it did apply to Article III judges (*id.* at 9a). The court thus entered judgment for appellees in the full amount of the unpaid cost-of-living increases due them without regard to the 1978 and 1979 Pay Acts (App. B, *infra*, 11a-12a).

THE QUESTIONS ARE SUBSTANTIAL

This case is closely related to the currently pending case of *United States* v. *Will*, question of jurisdiction postponed to the hearing on the merits, No. 79-983 (Feb. 19, 1980) (*Will I*). Both cases present the questions whether Congress intended the various Pay Acts to supersede the annual Adjustment Act increases for federal judges, and, if so, whether the Acts are constitutional under the Compensation Clause. Both cases are class actions brought against the United States on behalf of Article III judges, and both cases were decided by the same district judge, who rested his decision in the instant case largely on his prior opinion in *Will I*.

For the reasons stated in our Jurisdictional Statement in *Will I*, the Court should note probable jurisdiction in this case.[2] Moreover, because substantially the same issues are presented in both cases, and because a prompt and complete resolution of these issues is desirable, we believe that the two cases should be consolidated for purposes of briefing and

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[2] In *Will I*, the Court has postponed the question of jurisdiction to the hearing on the merits and has directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (Order of Feb. 19, 1980). The issue of judicial disqualification under 28 U.S.C. 455, and the effect of that statute on the "rule of necessity," are also presented in the instant case. See also note 1, *supra*. As discussed in our Jurisdictional Statement in *Will I* (pages 15-17 n.12), we believe that the "rule of necessity" is applicable here and that the district judge and the Justices of this Court are not disqualified in this case.

oral argument. See R. Stern & E. Gressman, *Supreme Court Practice* § 14.10, at 750-751 (5th ed. 1978).[3]

1. As in *Will I*, the instant case presents a preliminary issue whether Congress intended the 1978 and 1979 Pay Acts to supersede or rescind the cost-of-living increases authorized for federal judges by the Adjustment Act. If the district court correctly concluded that Congress did not so intend, it would be unnecessary for the Court to consider the constitutional issues presented. See *United States* v. *Clark*, No. 78-1513 (Feb. 26, 1980), slip op. 4-5. Accordingly, we shall first address these statutory questions.

a. Appellees contended below, and the district court held, that the 1978 and 1979 Pay Acts were merely appropriations measures that refused to fund the cost-of-living increases but did not alter the substantive terms of the Adjustment Act. We submit that there is ample indication of Congress' intent substantively to supersede the Adjustment Act increases for fiscal years 1979 and 1980.

The legislative history of the 1978 Pay Act plainly establishes that Congress intended to bar the cost-of-living increases scheduled for October 1978. The House report noted that the Pay Act was a "change [in] the application of existing law" (H.R. Rep. No. 95-1254, 95th Cong., 2d Sess. 31 (1978)) and ex-

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[3] A motion to consolidate the cases for briefing and oral argument will be filed shortly.

plained that it

> provid[es] for *a pay freeze* for those individuals in the legislative, executive, and judicial branches and in the government of the District of Columbia, whose rate of pay was directly or indirectly increased as a result of the pay increases which went into effect in 1977 under the [Federal Salary Act]. Under the proviso, any individual whose rate of pay is $47,500, or more, is covered *by the freeze during fiscal year 1979.*

Id. H.R. Rep. No. 95-1254, *supra*, at 35 (emphasis added); see also *id.* at 29, 39. The Senate report expressed the same understanding, emphasizing that the 1978 Pay Act "continues for fiscal year 1979 the so called 'cap' on upper level salaries in the Legislative, Executive, and Judicial branches of government." S. Rep. No. 95-1024, 95th Cong., 2d Sess. 50 (1978).[4] And the floor debates consistently recognized that the 1978 Pay Act was designed to eliminate the scheduled cost-of-living increase. In intro-

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[4] We also note that the 1978 Pay Act expressly provides (App. D, *infra*, 23a; emphasis added):

> For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, *the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.*

This provision basing employee benefits and deductions on the employee's salary after application of the 1978 Pay Act serves to confirm Congress' understanding that the Pay Act was a substantive limitation of the cost-of-living salary increase for fiscal year 1979.

ducing the Act, Representative Shipley, the subcommittee chairman, stated that the Act "provides for a pay freeze for those individuals in the legislative, executive, and judicial branches * * * whose rate of pay was either directly or indirectly increased [in 1977 under the Federal Salary Act]." 124 Cong. Rec. H5507 (daily ed. June 14, 1978). Representative Armstrong, the ranking minority member of the subcommittee, similarly explained that "automatic cost-of-living increases will not be permitted * * *." *Id.* at H5508.[5]

An examination of the 1979 Pay Act likewise reveals that Congress intended the statute substantively to reduce the annual cost-of-living adjustment for fiscal year 1980. The Act explicitly states (App. D, *infra*, 24a-25a) that "notwithstanding the provisions of * * * the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay * * *, [the 1978 Pay Act], which

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[5] See also 124 Cong. Rec. H5509 (daily ed. June 14, 1978) (remarks of Rep. Derwinski) ("limit high-level salaries at this time, and that would include judiciary and executive branch as well as legislative"); *id.* at H5510 (remarks of Rep. Pattison) ("blocks Members of Congress and top-level Federal officials from receiving the 5-percent so-called cost-of-living salary adjustment this year. This is the second year in a row that we have refused a scheduled increase in our salaries. * * * [W]e rejected last year's adjustment and we are doing so again this year. * * * I am in complete agreement to turning down the pay raise this year"); *id.* at S12614 (daily ed. Aug. 4, 1978) (remarks of Sen. Sasser) ("freeze, during fiscal year 1979, the pay of any individual in the executive, legislative, and judicial branches of Government whose rate of pay is $47,500 per year or more").

limit[s] the pay for certain Federal offices and positions, shall apply * * * for the fiscal year 1980, except that [pay increases not to exceed 5.5% shall be allowed]." The Act also provides (*ibid.*) that the 5.5% increase "if accepted shall be in lieu of the 12.9 percent [otherwise] due for such fiscal year [1980]." On its face, then, the 1979 Pay Act clearly demonstrates that it was designed to limit the cost-of-living salary increases for fiscal year 1980 irrespective of the Adjustment Act or any other provision of law.

The legislative history of the 1979 Pay Act confirms that the legislation constituted a substantive enactment. The House report stated that the Act "reduces Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum," a result that was recognized to be a "change [in] the application of existing law." H.R. Rep. No. 96-500, 96th Cong., 1st Sess. 7 (1979). In explaining the purpose of the Pay Act, the House report further stated (*id.* at 3; emphasis added):

> Our problem is that our rate of inflation is so great that we must take immediate steps to moderate increases and help move toward stability.
>
> One of these places where such laws have taken over is that of Federal executive pay, which *under existing law* would increase by 12.9 percent.
>
> In an effort to help deal with these problems, the committee is providing that for the fiscal year 1980, funds available for payment to execu-

> tive employees, which includes Members of Congress, who *under existing law* are entitled to approximately 12.9-percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5-percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year. This action, *sharply decreasing such automatic increases*, is taken in an effort to contribute toward the objective of immediately slowing and over a period eventually stopping further inflation. *The limitation of 5.5 percent represents a significantly sharp decrease* and amounts to only about one-fourth to one-third of the actual rate of inflation during this period. It is hoped that this example will be followed by other parts of the Federal Government, private industry, and State and local government. Unless we slow down, we face disastrous inflation which has wrecked the economy of other nations.[6]

The Conference report reiterated that, in order to help combat the urgent national problem of inflation, the 1979 Pay Act "restricts Cost-of-Living increases to 5.5 percent instead of the 12.9 percent provided by law, for executive employees, including Cabinet officers, agency heads, Members of the House of Representatives and Senators, federal judges, various high ranking departmental and agency officers, cer-

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[6] The House report also recognized (H.R. Rep. No. 96-500, *supra*, at 3) that "in the last 2 years * * * [since the quadrennial review of 1977] Federal executive pay has been frozen."

tain supergrade personnel, and others * * *." H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. 3 (1979). And the debate in both Houses plainly disclosed the congressional understanding that the 1979 Pay Act would restrict the salary increase for fiscal year 1980 to 5.5% and thereby prevent the larger increase provided under the Adjustment Act.[7]

Thus, we submit that the 1978 and 1979 Pay Acts plainly were intended by Congress to supersede the provisions of the Adjustment Act authorizing cost-of-living increases for fiscal years 1979 and 1980.

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[7] See 125 Cong. Rec. H8850 (daily ed. Oct. 9, 1979) (remarks of Rep. Latta) ("the 5.5 percent the Committee on Appropriations has allowed * * * is a reduction from the 12.9 percent authorized under present law"); *id.* at H8852 (remarks of Rep. Whitten) ("[t]his action * * * sharply decreas[es] such automatic increases"); id. at H8854 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.* at S14320 (daily ed. Oct. 10, 1979) (remarks of Sen. Magnuson) ("a 5.5 percent pay raise"); *id.* at S14483 (daily ed. Oct. 12, 1979) (remarks of Sen. Young) ("a 5.5 percent pay raise * * * [the Act would] reduce that 12.9 [percent salary increase] to 5.5 percent. * * * This provides for limiting the cost-of-living increase to 5.5 percent, rather than the 12.9 percent automatic increase now in effect"); *ibid.* (remarks of Sen. Byrd) ("put a cap on that [12.9 percent] pay increase and make it 5.5 percent"); *id.* at S14484 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation [on the 12.9 percent increase]"); *id.* at S14486 (remarks of Sen. Stevens) ("the 5.5 [percent] pay cap"); *id.* at H9076 (remarks of Rep. Whitten) ("a cap on the amount of compensation * * * which limits the amount to the 5.5 percent as against the 12.9 percent which is provided by law, but for which no appropriation has been made"); *id.* at H9080 (remarks of Rep. Conte) ("reduces from 12.9 to 5.5 percent the increase in pay").

b. With respect to the 1979 Pay Act, the additional statutory question is presented whether the Act applies at all to federal judges. Appellees argued below, and the district court indicated that it was "inclined to agree" (App. A, *infra*, 9a), that the Act is inapplicable to judges because it is limited to "executive employees, which includes Members of Congress" (App. D, *infra*, 24a).[8]

We submit that the 1979 Pay Act by its terms does apply to federal judges regardless of whether judges are encompassed within the phrase "executive employees, which includes Members of Congress."[9] Wholly apart from the provision cited by appellees, the 1979 Pay Act expressly states in a separate provision that the 1978 Pay Act, as amended to allow a 5.5% cost-of-living increase, "shall apply" to the fiscal year 1980 adjustments (App. D, *infra*, 24a). Since the 1978 Act unquestionably covers the "ju-

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[8] See also *Foley* v. *Carter*, Civil Action No. 79-3063 (D.D.C. Mar. 24, 1980). In *Foley*, an action brought by the Director of the Administrative Office of the United States Courts, the district court held, in agreement with the contention of appellees here, that the 1979 Pay Act "does not apply to the judicial branch" (slip op. 11).

[9] In our view, the phrase "executive employees," as used in this area of the law, is a term of art that includes federal judges. Indeed, the very statute that provides the annual salary increase for judges is entitled the "*Executive* Salary Cost-of-Living Adjustment Act" (App. D, *infra*, 14a; emphasis added). The phrase "executive employees" in the 1979 Pay Act therefore should be understood to mean those persons whose cost-of-living increases are governed by the Adjustment Act.

dicial branch" (App. D, *infra*, 22a), it is evident that the 1979 Pay Act on its face is applicable to federal judges.

This conclusion is strongly supported by the legislative history of the 1979 Pay Act. The Conference report unambiguously stated that the Act "restricts Cost-of-Living increases to 5.5 percent instead of 12.9 percent provided by law, for executive employees, including * * * federal judges * * *." H.R. Conf. Rep. No. 96-513, *supra*, at 3. Similarly, Representative Whitten, the manager of the Act in the House, explained that the Act "appl[ies] the 5.5-percent cap to the Federal judges * * *" (125 Cong. Rec. H8853 (daily ed. Oct. 9, 1979)). Other legislators also acknowledged the applicability of the Act to federal judges. See *id.* at H8850 (remarks of Rep. Latta); *id.* at H8854 (remarks of Rep. Jacobs); *id.* at S14486 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at H8138-H8139 (daily ed. Sept. 19, 1979) (remarks of Rep. Derwinski); *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Nothing in this legislative record suggests in any way that federal judges, who had consistently been included in the several preceding Pay Acts, were to be exempted from the 1979 Pay Act.[10]

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[10] We recognize that some members of Congress doubted whether the 1979 Pay Act could constitutionally be applied to federal judges to reduce the cost-of-living salary increase that had already become effective. See 125 Cong. Rec. S14486-S14487 (daily ed. Oct. 12, 1979) (remarks of Sen. Stevens); see also *id.* at S16706 (daily ed. Nov. 15, 1979) (remarks of Sen. Mathias). Other members of Congress took the posi-

2. If we are correct that the 1978 and 1979 Pay Acts were intended by Congress to control the cost-of-living increases for federal judges in fiscal years 1979 and 1980, then the Court must consider the constitutionality of the Pay Acts under the Compensation Clause. For the reasons set forth in our Jurisdictional Statement in *Will I*, we submit that the 1978 and 1979 Pay Acts do not violate the Compensation Clause.

a. The Adjustment Act increase for fiscal year 1979 was to become effective for federal judges on October 1, 1978. Thus, when the 1978 Pay Act was signed into law on September 30, 1978, that increase had not yet taken effect. As discussed in our Jurisdictional Statement in *Will I* (pages 22-26), such an expected increase was not part of the judges' compensation at the time the Pay Act was adopted, and therefore the Act did not diminish their compensation.[11]

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tion that application of the Act to federal judges would not be unconstitutional and urged that the matter be resolved by the courts. See *id.* at H8854 (daily ed. Oct. 9, 1979) (remarks of Rep. Jacobs). Still others simply noted the issue and recommended that it be left to the courts. See *id.* at H8852 (remarks of Rep. Whitten); cf. *id.* at H8850 (remarks of Rep. Latta). However, all of these statements concerning the constitutionality of the Act, including the remarks of Senator Stevens relied on by the district court in *Foley* v. *Carter*, *supra*, slip op. 10-11, were premised on the recognition that the Act, as drafted and eventually signed into law, did apply to judges.

[11] Since Congress enacted the 1979 Pay Act on October 12, 1979, 11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for judges, the 1979 Pay Act cannot

b. In any event, as discussed in the Jurisdictional Statement in *Will I* (pages 27-31), a statute diminishing judicial compensation is not unconstitutional under the Compensation Clause if it does not discriminate against Article III judges or undermine their independence. Here, appellees have never alleged that the Pay Acts discriminated against federal judges or constituted an attack on their independence, and there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions. Rather, the Acts were based on important fiscal policy considerations extending far beyond the federal judiciary, and were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, members of Congress, and judges. In such circumstances, the 1978 and 1979 Pay Acts did not offend the Compensation Clause.

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be defended on the ground that it was not a diminution of the judges' compensation. No issue is presented in this case concerning judges' pay for the period October 1 through October 11, 1979.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

KENNETH S. GELLER
Acting Solicitor General *

ALICE DANIEL
Assistant Attorney General

MARK I. LEVY
Assistant to the Solicitor General

NEIL H. KOSLOWE
Attorney

APRIL 1980

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* The Solicitor General has disqualified himself in this case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 79 C 4368

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE R. HARRIS, IRVING HILL, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

ORDER

Before the court are motions by the plaintiff judges for class certification and summary judgment, and a cross-motion for summary judgment filed by defendant. In view of this court's previous decision of August 29, 1979, both of plaintiffs' motions are granted, and, therefore, defendant's motion for summary judgment is denied.

We consider first plaintiffs' motion for class certification. Plaintiffs' propose that the Class in Count I consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1978

and who continued to hold said office subsequent to commencement of the first pay period thereafter. Count I of the Amended Complaint alleges that P.L. 95-391, which became law on September 30, 1978, unconstitutionally diminished the compensation of plaintiffs in the proposed class.

The Class proposed for Count II of the Amended Complaint would consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1979, and who continued to hold said office subsequent to October 12, 1979. Count II of the Amended Complaint alleges that P.L. 96-86, which was passed on October 12, 1979, unconstitutionally diminished the compensation of plaintiffs in the proposed class.

Rule 23 of the Federal Rules of Civil Procedure contains the essential prerequisites for maintaining a class action. Here plaintiff proposes classes under the provision of 23(b)(2).

Rule 23(a) provides that one or more members of a class may sue or be sued on behalf of the class if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

In the instant action, these prerequisites are easily met. Plaintiffs seek to represent a class which consists of more than 600 persons. This is clearly a class so numerous that joinder would be impracticable.

All issues presented in the Amended Complaint are common to each member of the proposed classes—namely, whether Congress' actions in P.L. 95-391 (Count I) and P.L. 96-86 (Count II) violated Article III Section 1 of the United States Constitution. The second prerequisite of Rule 23 is, therefore, satisfied. Likewise, the third prerequisite, that the claims of the representative parties be typical of the claims of the members of the classes, is satisfied, as the claims of the representatives are identical to the claims of every member of the proposed classes. Additionally, the fourth requirement is met in that the named plaintiffs are fourteen members of the United States Courts and their counsel is experienced in litigation of this nature.

The prerequisite of Rule 23(a) having been met, the requirement contained in Rule 23(b)(2) must also be satisfied.

Rule 23(b)(2) provides:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

It is clear from the original and Amended Complaint that the United States, "the party opposing the class," has through Congress' actions "acted or re-

fused to act on grounds generally applicable to the class." And, in light of the claims of the class, declaratory relief is an appropriate remedy as to each class.

Accordingly, plaintiffs' motion for class certification is hereby granted.

The class in Count I shall consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1978, and who continued to hold said office subsequent to commencement of the first pay period thereafter. The class in Count II shall consist of all persons who served as Judges of the United States pursuant to Article III of the Constitution of the United States prior to October 1, 1979, and who continued to hold said office subsequent to October 12, 1979.

We now turn to plaintiffs' motion for summary judgment.

This is the second (Will II) of two actions (Will I and Will II) filed by the plaintiff judges, which attack as unconstitutional Congress' attempts to eliminate the cost-of-living increases provided for by law for plaintiffs. Since the present discussion will be brief, the court recommends a reading of our previous decision in Will I, *Will, et al.*, v. *U.S.*, —— F.Supp. —— (N.D. Ill. 1979), No. 78-420 (August 29, 1979).

It is clear from the government's motion in opposition to plaintiffs' motion for summary judgment and in support of its cross-motion that the defen-

dant's misunderstand or have ignored this court's earlier ruling.

In essence, we stated in our earlier opinion (Will I) that Congress' various efforts to avoid paying or eliminating plaintiffs' cost-of-living increases violated Article III § 1 of the United States Constitution. In the instant case, Congress' failure to pay 1978 and 1979 cost-of-living increases violates Article III § 1 for the same reasons that identical actions by Congress in 1977 were held unconstitutional.

Article III § 1 states that Judges of the United States Courts

> shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

It has long been held that this provision of the Constitution imposes upon Congress the duty to "definitely declare what sum shall be received by each judge out of the public funds and the times for payment." See, *Miles* v. *Graham*, 268 U.S. 501, 508-509 (1925); *Evans* v. *Gore*, 252 U.S. 245 (1920); and *Atkins* v. *United States*, 556 F.2d 1028, 1044 (Ct.Cl. 1977).

In 1975, Title 28 U.S.C. § 135 was amended by Congress. In effect, the amendment added a cost-of-living increase component to the stated annual salaries previously received by judges. That amendment read:

> Each judge of a district court of the United States shall receive a salary at an annual rate determined under Section 222 of the Federal Salary Act of 1967 . . . as adjusted by Section 461 of this title.

Section 461 provides that salaries of judges and other executive level employees shall include an annual adjustment measured by the average percentage adjustment of the General Schedule as determined under 5 U.S.C. § 5305.

By statutorily providing for a judge's compensation, which includes an "annual salary . . . as adjusted," Congress complied with their duty under Article III § 1 to definitely declare a compensation to be received by judges.

> When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

See, *Miles* v. *Graham, supra; Evans* v. *Gore, supra*; and *Atkins* v. *U.S., supra.*

Consequently, subsequent to the 1975 amendment to 28 U.S.C. § 135, the judge's compensation became an annual salary as adjusted by the cost-of-living increase percentage.

The facts underlying Count I of the instant complaint are as follows. On September 30, 1978, Congress passed P.L. 95-391 providing in pertinent part:

> No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or

> pay of any individual in any office or position in the . . . judicial branch . . . at a rate which exceeds the rate . . . of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of Title 5, United States Code. . . .

Section 314(a)(1) of P.L. 95-391. Because the federal judges salary was fixed "at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule on September 30, 1978", P.L. 95-391 affected the salary of the plaintiff class of judges.

As of October 1, the annual adjustment became effective. On October 7, 1978, the President issued Executive Order No. 12087, pursuant to the Comparability Act and the Executive Adjustment Act, increasing by an average of 5.5% the rates of pay theretofore paid to plaintiffs and the class. However, due to the prohibition contained in P.L. 95-391, the 5.5% adjustment was not paid to federal judges.

Plaintiff's contend, and this court agrees, that Congress' action of refusing to pay, or withholding the funds to pay, the cost-of-living adjustment violated the provisions of Article III § 1 which provides that a judges compensation shall not be diminished during their continuance in office.

Contrary to the government's contentions, Congress' refusal or failure to appropriate funds does

not repeal, suspend, or postpone the operation of the Cost-Of-Living Adjustment Act as it applies to federal judges. By refusing to pay the adjustment provided for by statute for federal judges, Congress is directly diminishing the compensation provided for by statute for federal judges. Consequently, federal judges, the plaintiffs' herein, are entitled to the 5.5% adjustment effective October 1, 1978.

Count II of the plaintiffs' complaint alleges that similar conduct by Congress in October, 1979 resulted in violations of Article III § 1. This court agrees.

On August 31, 1979, the President submitted a Federal Pay Comparability Alternative Plan which provided "a 7% increase in rates of pay at each grade for most employees under the federal statutory pay systems, including Article III judges." This adjustment took effect on October 1, 1979, the first day of the first pay period, since the plan was not disapproved by either house of Congress. See 5 U.S.C. § 5303(c)(2). In addition, the unconstitutional restriction on the use of appropriated funds contained in P.L. 95-391, discussed above, expired as of September 30, 1979. Consequently, the 5.5% adjustment contained in Executive Order 12087 also became payable on October 1, 1979. The total of these adjustments equaled 12.9% as is confirmed by Congress' adoption of P.L. 96-86, a House Joint Resolution providing in part, as follows:

> For the fiscal year 1980, funds available for payment to executive employees, which includes

> members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum, if accepted, shall be in lieu of the 12.9 percent due for such fiscal year.

This resolution followed thirty days after both the fiscal 1979 and fiscal 1980 adjustments had been determined and had become payable.

Plaintiffs contend that P.L. 96-86 is not applicable to them as they are neither "executive" employees nor "members of Congress." While this court is inclined to agree with plaintiffs' contention, we note that even if it were applicable to plaintiffs, it clearly violates the prohibition contained in Article III § 1 that judges salaries shall not be diminished during their terms of office.

By way of summary, this court wishes to note that Congress has repeatedly done violence to Article III § 1 since they amended 28 U.S.C. § 135 in 1975. Essentially, this amendment retained the previous annual salary component of a judges salary and added that a judge's total compensation would be this annual rate "as adjusted by Section 461 [the Adjustment Act] of this title."

On October 1, 1975, the federal judges received their first and only adjustment pursuant to Executive Order No. 11883 which provided for a 5% adjustment.

Thereafter, Congress has unconstitutionally attempted to avoid paying judges the adjustments. In three instances, the two years challenged in this case (Will II), and one of the years challenged in our prior decision (Will I), Congress refused to appropriate the necessary funds to pay the adjustment provided for by statute. Congress' contention that their actions of not appropriating funds prevented the adjustment from vesting is wholly without merit. Repealing a statute is one thing; refusing to appropriate funds another. And, as we previously noted, the failure to appropriate funds does not defeat a governmental obligation created by statute. See e.g. *State of Louisiana* v. *Weinberger*, 369 F.Supp. 856, 860 (E.D. La. 1973); *New York Airways, Inc.* v. *U.S.*, 369 F.2d 743, 748 (Ct.Cl. 1966).

It is ordered that plaintiffs' motion for summary judgment be and the same is hereby granted. Consequently, defendant's motion for summary judgment is denied.

ENTER

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge, United States District Court

Dated January 31, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 79 C 4368

HUBERT L. WILL ET AL.

vs.

U.S.A.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that, as to Count I of the amended Complaint, judgment is hereby entered for plaintiffs and each member of their class, in the full amount of the unpaid compensation due pursuant to the provisions of the Executive Salary Cost-of-Living Act, P.L. 94-82, for the period October 1, 1978 through the date of this Judgment Order, said amount to be determined without regard for any restriction contained in Section 304(a)(1) of the 1979 Legislative Appropriations Act, P.L. 95-391, and defendant is ordered to pay said amount and to compute the salary of plaintiffs and their class without regard to the referred to restriction contained in Section 304(a)(1).

It is further ordered that, as to Count II of the Amended Complaint, judgment is hereby entered for plaintiffs and each member of their class, in the full amount of the compensation due pursuant to the provisions of the Executive Salary Cost-of-Living Act, P.L. 94-82, for the period October 1, 1979 through the date of this Judgment Order, said amount to be determined without regard for any restriction contained in Section 101(c) of P.L. 96-86 and defendant is ordered to pay said amount and to compute the salaries of plaintiffs and their class without regard to the referred to restriction in Section 101(c) of P.L. 96-86.

It is further ordered that, from the date of this Judgment Order, plaintiffs and each member of their class shall recover the amounts set forth above with interest thereon as provided by law.

Dated at Chicago, Illinois, this 12th day of February, 1980.

H. STUART CUNNINGHAM
Clerk of Court

By /s/ H. R. Chery
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4368

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE R. HARRIS, IRVING HILL, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL

[March 10, 1980]

Defendant, United States of America, appeals under 28 U.S.C. 1252 (1976) to the United States Supreme Court from the judgment of this Court entered on February 12, 1980.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General

/s/ Neil H. Koslowe
NEIL H. KOSLOWE
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APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Compensation Clause of the United States Constitution, Article III, Section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. Section 205 of the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, 422-423 provides:

> SEC. 205.(a)(1) Chapter 21 of title 28, United States Code, relating to general provisions applicable to courts and judges, is amended by adding at the end thereof the following new section:
>
> "§ 461. Adjustments in certain salaries
>
> "(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the

overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule.

"(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.".

(2) The analysis of chapter 21 of such title is amended by adding at the end thereof the following new item:

"461. Adjustments in certain salaries.".

(b)(1) Section 5 of title 28, United States Code, relating to salaries of justices of the Supreme Court, is amended to read as follows:

"§ 5. Salaries of justices

"The Chief Justice and each associate justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(2) Section 44(d) of title 28, United States Code, relating to salaries of circuit judges, is amended to read as follows:

"(d) Each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(3) Section 135 of title 28, United States Code, relating to salaries of district judges, is amended to read as follows:

"§ 135. Salaries of district judges

"Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(4) The second sentence of section 173 of title 28, United States Code, relating to salaries of judges of the Court of Claims, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(5) The second sentence of section 213 of title 28, United States Code, relating to salaries of judges of the Court of Customs and Patent Appeals, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(6) The second sentence of section 252 of title 28, United States Code, relating to judges of the Customs Court, is amended to read as follows: "Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.".

(7) So much of the first sentence of section 792(b) (relating to salaries of Court of Claims commissioners) of title 28, United States Code, as precedes ", and also all necessary traveling expenses" is amended to read as follows: "Each commissioner shall receive pay at an annual rate determined under section 225 of the Federal

Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title".

(8) The first sentence of section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), relating to compensation of referees in bankruptcy, is amended to read as follows: "Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates, in the case of full-time referees, not more than the rate determined for such referees under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted under section 461 of title 28, United States Code, and in the case of part-time referees, not more than one-half of such rate, as so adjusted.".

3. 5 U.S.C. 5305 provides in pertinent part:

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendation for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be

deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but no more than 3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing that rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates and the rates of pay for the same levels of work in private enterprise;

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

* * * * *

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

4. Section 304 of the Legislative Branch Appropriation Act, 1979, Pub. L. No. 95-391, 92 Stat. 763, 788-789, provides:

SEC. 304. (a) No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—

(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or

(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

(b) For purposes of subsection (a), the rate or maximum rate (as the case may be) of salary or basic pay payable for September 30, 1978, for any office or position which was not in existence on such date shall be deemed to be the rate or maximum rate (as the case may be) of salary or basic pay payable to individuals in comparable offices or positions for such date, as determined under regulations prescribed—

(1) by the President, in the case of any office or position within the executive branch

or in the government of the District of Columbia;

(2) jointly by the Speaker of the House and the President pro tempore of the Senate, in the case of any office or position within the legislative branch; or

(3) by the Chief Justice of the United States, in the case of any office or position within the judicial branch.

(c) For purposes of administering any provision of law, rule, or regulation which provides retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

5. Section 101(c) of the Act of October 12, 1979, Pub. L. No. 96-86, 93 Stat. 656, 657, provides:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1980, and for other purposes, namely:

* * * * *

(c) Notwithstanding the provisions of sections 102 and 106 of this joint resolution, such

amounts as may be necessary for continuing projects and activities to the extent and in the manner as provided in H.R. 4390, entitled the Legislative Branch Appropriation Act, 1980, as reported June 7, 1979 (except as to executive salaries which are covered subsequently) and such amounts as may be necessary for continuing projects or activities for which disbursements are made by the Secretary of the Senate, and the Senate items under the Architect of the Capitol, to the extent and in the manner which would be provided for in the budget estimates, as amended, for fiscal year 1980.

For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.

Provided, further, That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-Of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, and notwithstanding section 102 of this joint resolution, the provisions of section 304 of the Legislative Branch Appropriation Act, 1979, which limit the pay for certain Federal offices and positions, shall apply to

funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

Any additional payment under existing law is not to be construed as an increase in salary or emoluments within the meaning of Article I, section 6, clause 2 of the Constitution, except that:

(1) Any Member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia, or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said Circuit Judge on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution;

(2) The designated United States District Courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office;

(3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and

(4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

For purposes of this subsection, H.R. 4390, as reported June 7, 1979, shall be treated as appropriating $11,000,000 under the headings "OFFICE OF TECHNOLOGY ASSESSMENT," "SALARIES AND EXPENSES"; $200,300,000 under the headings "GENERAL ACCOUNTING OFFICE", "SALARIES AND EXPENSES"; and $50,707,000 under headings "JOINT ITEMS", "OFFICIAL MAIL COSTS".

No funds contained in this section shall be used to remodel the gallery in Statuary Hall in the Capitol into carrels or into any other structure constituting additional office or work space for Members of Congress.

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